U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 21 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as an agricultural engineer. At the time he filed the petition, the petitioner was a postdoctoral agricultural scientist at the North Dakota. In November 2012, filed a nonimmigrant petition on the petitioner's behalf (Form I-129 receipt number , the subsequent approval of which permits the petitioner to work for the university until November 24, 2015.

The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and several exhibits relating to his work.

Before the filing of the appeal, attorney represented the petitioner. Mr. prepared statements submitted with the petition and in response to a request for evidence (RFE). Subsequently, however, Mr. did not prepare or sign the Form I-290B Notice of Appeal and the petitioner mailed the appeal from his own Kansas address. The petitioner, on appeal, refers to past actions by Mr. but offers no indication that Mr. still actively represents him in this proceeding. Form I-290B advises that attorneys "must attach a Form G-28, Notice of Entry of Appearance as Attorney or Representative" to the appeal, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a). The appeal does not include this form. Therefore, the record contains no indication that Mr. is still the petitioner's attorney of record. The AAO will therefore consider the petitioner to be self-represented, and the term "prior counsel" shall refer to Mr.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
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> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as a member of the professions holding an advanced degree, and stated that "whether or not the petitioner may also be eligible as an alien of exceptional ability . . . is moot." The petitioner has not contested this conclusion (which is separate from, and does not affect, the issue of eligibility for the national interest waiver). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) *(*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future

contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The director did not dispute that the petitioner's work, conducting agricultural research for dissemination throughout the scientific community, has substantial intrinsic merit and produces benefits that are national in scope. The issue is whether the petitioner has met the third prong of the *NYSDOT* national interest test by establishing a level of impact and influence in his field that warrants a national interest waiver.

The petitioner filed the Form I-140 petition on January 20, 2012. In an accompanying introductory statement, prior counsel stated:

> Petitioner has made significant contributions in the field of agricultural engineering. In particular, Petitioner has made pioneering research in the area of assessing crop residue cover by developing more effective remote sensing methods. . . . Petitioner's doctoral dissertation on the temporal changes in Kansas streams was one of the first attempts to link agricultural watershed land and water uses and their effects on the aquatic ecosystem. Moreover, this dissertation research has erased the boundaries between pure hydrology and biology. Lastly, as a follow up to Petitioner's research on the role of crop selection and sequencing in the conservation of agricultural systems, Petitioner is currently working on an ambitious project to evaluate the changes in crop diversity in the U.S. over time and the potential causes and impacts of these changes. The product of Petitioner's current research would be a map of the crop diversity index of the U.S. which would be used [by] policy makers in drafting federal agricultural programs and in managing the agricultural sector.
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> . . . [T]he fact that Petitioner is working for the under an H-1B visa is a strong indication that his employment would serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. . . . The provides leadership on issues of food, agriculture and natural resources and implements agricultural policies. The is the principal in-house scientific research arm of the The is the principal in-house scientific research arm of the . . . By being part of the elite scientific team at and contributing to its research priorities, Petitioner has already been serving the national interests at the highest levels.

The petitioner's employment with the alone is not evidence of eligibility for the national interest waiver. There exists no blanket waiver based on employment with the

Prior counsel stated: "it took more than 9 months to find Petitioner by means of an international job search. Should a labor certification be required, it would be reasonable to expect the same difficulties." A lack of qualified United States workers who seek the position would be grounds for approving the labor certification, rather than denying it or delaying the process.

Furthermore, the record shows that the nine-month job search pertained to a two-year postdoctoral position at the Montana. Such a position is inherently temporary, and constitutes advanced on-the-job training rather than a career position. The petitioner, in fact, left his position at the before he filed the petition. Prior counsel's claims about the difficulty of filling the position are irrelevant to the waiver application, because granting the waiver would not return the petitioner to this temporary training position.

In a statement submitted with the petition, the petitioner stated:

> I believe that my purpose in life is to help the farmers who feed the world. Therefore, I will be instrumental in improving the lives of the farmers through researches and activities promoting sustainable agriculture and improved production practices, and empowering them through informed decision making and management. My research interest is anchored around this main goal supported by four major topics: soil and water conservation, geospatial analysis, watershed modeling, and extension outreach.

The petitioner provided details regarding these four research areas, for instance: "The most recent research I conducted was focused on applying remote sensing techniques to quantify crop residue cover on the field for soil and water conservation, carbon cycle modeling, and biofuel applications."

The petitioner submitted nine witness letters. Before retiring in 2010, Professor supervised the petitioner's doctoral studies at Prof. stated that the petitioner's "graduate work was one of the first attempts to link agricultural watershed land and water uses and their effects on the aquatic ecosystem," and that his "contributions to this important work during his doctoral program were substantial for adding understanding to the effects of changing conditions in watersheds brought about by changes [in] agricultural land and water use on streamflow." Regarding the petitioner's more recent work, Prof. stated: "I am less familiar with [the petitioner's] work that he has done for the but I know that all of it has been deemed to be in the national interest by the federal government."

The remaining witnesses worked or collaborated with the petitioner at the either at the in Montana (where the petitioner worked from June 2009 to June 2011), or at the in North Dakota.

Dr. supervisory research agricultural engineer at the and the petitioner's direct supervisor there, stated:

> [The petitioner's] postdoctoral research in Montana was on multispectral remote sensing techniques and the use of a special ratio of specific spectral wavelengths called the cellulosic adsorption index (CAI). [The petitioner] used the CAI to evaluate post-harvest plant residues, with emphasis on dryland and irrigated cropping systems in North Dakota. [The petitioner] worked directly with several other scientists on this research across the nation, and he directly contributed to and complemented ongoing US government research in His research findings are proving to be a valuable tool in the timely and large-scale assessment of compliance of various conservation tillage practices promoted by USDA farm programs and to indicate the scale of potential impacts of adverse conditions such as drought. [The petitioner's] results are also being reviewed for use in assessing national agricultural carbon sequestration programs, rangeland fuel load assessments for wildfire management, and potential dryland biofuel production in the Northern Great Plains region. . . . He has two scientific papers approved for publication and one in draft as a result of this work.

Dr. now an associate professor at previously worked for the where he collaborated with the petitioner. Dr. asserted that the petitioner's "research in Montana has comprised both excellence in science and answers to practical problems. . . . The immediacy of results that should now be available due to [the petitioner's] research will enhance development, profitability, and sustainability of second generation biofuels."

Dr. , research soil scientist at the stated that the petitioner's "findings will be useful in data analysis and in planning data acquisition programs for crop residue, which are essentially nonexistent at present."

Dr. of the Colorado, collaborated with the beneficiary in "the measuring of crop residue cover in harvested plots using remote sensing techniques." Dr. asserted that the petitioner's "research provides us with a new quick remote method for measuring the amount and the type of crop residues left in the field," which "is of great value to managers and policy makers in the Bread Basket of the USA but also could provide critical information regarding potential for droughts and famines in other parts of the world."

Dr. rangeland scientist and project director at the and the petitioner's immediate supervisor there, stated:

> [The petitioner's] postdoctoral research focuses on using Geographic Information Systems (GIS) and database management techniques to evaluate national changes in crop diversity over time. Addressing major agricultural issues in the future will require research that moves beyond small research plots to the landscape, regional or

> even national levels. [The petitioner's] unique blend of GIS and database management skills as well as a biological understanding of natural resources that make him uniquely qualified to address these problems. . . .
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> The major project he is working on is evaluating changes in crop diversity over time at the national level. . . . [The petitioner] is leading a team that is evaluating the spatial and temporal changes in crop diversity, and also determining potential causes and impacts of these changes. . . .
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> [The petitioner] is also working on a project to develop a 'natural beef' system for the . . . [which] may provide a source of employment and a healthier food alternative.

Dr. laboratory director and research leader at the is Dr. s supervisor, stated that the petitioner's "research skills and knowledge are rare in the United States" and that the petitioner's "research on understanding how to maintain crop diversity nationwide and on developing tools to better manage crops for both food and bioenergy will benefit the nation's farmers and ranchers."

Dr. an ecologist at the stated that he and the petitioner "have planned to collaborate together with other and university scientists on future research projects." Dr. asserted that the petitioner's "recent publications . . . are a testament to his ingenuity in advancing the science pertaining to soil and water conservation in managed agricultural lands."

Dr. research agronomist at the stated:

> I am impressed with the breath [*sic*] of [the petitioner's] technical expertise and insights. He is one of the brightest young scientists with whom I have worked. His research involves characterizing and modeling agricultural systems to identify and evaluate crop and soil management practices that will be sustainable with expected shifts [in] weather patterns. The analytical tools developed by [the petitioner] are very sophisticated and have contributed significantly to our understanding of the conservation practices that enhance soil carbon sequestration and enhance soil and water quality. With his broad technical background, he has been able to integrate physical models and statistical methods and to develop innovative algorithms for accurately assessing the growth and development of agricultural crops. [The petitioner's] work will significantly enhance the capability of the action agencies to monitor and forecast the effectiveness of soil and water conservation practices nationwide.
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> . . . Traditional remote sensing methods have had limited success discriminating crop residues from soils. [The petitioner] and I worked together to develop remote sensing

> approaches that are robust and well-suited for assessing crop residue cover and soil tillage intensity in the
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> These contributions to remote sensing technology and agriculture are far above those expected of a minimally qualified professional in his position. His list of scientific publications in respected peer-reviewed journals is outstanding.

The petitioner submitted copies of two journal publications, one from the *Philippine Journal of Agricultural and Biosystems Engineering*, 2008, and one from the *Agronomy Journal* in 2012. Three of the petitioner's witnesses, including Dr. are co-authors of the 2012 article. The petitioner also submitted evidence showing that the had accepted one of the petitioner's manuscripts for future publication. Dr. and Dr. were co-authors of that article as well. The petitioner was also one of nine authors of an unpublished manuscript that Dr. had submitted for publication in in late 2011. The petitioner did not show whether the journal had accepted the paper for publication; his own *curriculum vitae* listed the paper as "in review." The petitioner's *curriculum vitae* also identified ten other "technical papers," including his master's thesis, doctoral dissertation, and conference presentations.

The petitioner's initial submission did not establish interest in his work outside of the and the witness (Dr. who most highly praised the petitioner's published work was a co-author of two of the three articles that journals had accepted for publication. (That witness, on his own *curriculum vitae*, claimed authorship of 110 journal articles.) The director issued a request for evidence on July 30, 2012, instructing the petitioner to "establish . . . a past record of prior achievement that justifies projections of future benefit to the national interest." The director specifically requested evidence of the citation history of the petitioner's published work. In response, prior counsel stated: "The quantity of Petitioner's work might be modest but the quality is beyond question and is of major significance to his field."

Prior counsel repeated the assertion that "[a]gricultural engineers with PhDs, like Petitioner, are very difficult to find," a claim which would work in the petitioner's favor for positions that require that degree. The Department of Labor tests claims of worker shortages through the labor certification process, and thus such a shortage would be grounds for approving, rather than waiving, the job offer requirement. *See NYSDOT*, 22 I&N Dec. 218, 220 and 222.

Prior counsel again described the petitioner's various projects and accomplishments, but such descriptions do not establish their significance relative to the work of other researchers in the petitioner's specialty.

The petitioner submitted a printout from the Google Scholar search engine, identifying six citations of the petitioner's doctoral dissertation. One citation was a self-citation in a conference paper, and four of the remaining five citations appeared in papers by students and/or faculty members of where the petitioner wrote the dissertation.

The petitioner submitted copies of electronic mail messages from other researchers, who had various questions or requests for the petitioner regarding his work. The petitioner did not establish that such correspondence is unusual in the field, or otherwise demonstrates the impact of his work. One correspondent wrote to request a reprint of one of the petitioner's articles, which suggests that the person making the request had not yet read that article.

The petitioner submitted copies of two new publications. One is the article from the that the petitioner had previously identified as awaiting publication. The other paper appeared in February 2012 edition of the an internal newsletter.

The director denied the petition on November 9, 2012, stating that the evidence of record did not show "widespread implementation [of the petitioner's work] in the field." The director found the citation of the petitioner's work to be minimal, and indicated that the petitioner had not established the influence of his work beyond the collaborators who had provided witness letters.

On appeal, the petitioner submits copies of correspondence, articles, and conference presentation materials, some of which duplicate previously submitted exhibits. The petitioner asserts that "the impact of [his] research should not be solely judged by citations." The director did not base the decision entirely on the petitioner's citation record, but the low citation rate of the petitioner's work is consistent with the overall finding that the petitioner had not established the impact of that work.

The petitioner stated:

> A vital key in asserting the importance of this position is the timing when I was hired at the [in] 2011. This was also during the time when the federal budget was cut, ten experiment stations were shut down, hundreds of government employees were displaced, and early retirement and buy-out were offered to employees in the . . . This condition alone could justify the third NYSDOT test whereby I was hired despite the budget and human resource challenges haunting the [at] that time.

The petitioner's hiring is not, itself, evidence of his impact or influence on the field. The petitioner has not shown that the budget issues that he discussed had any impact on the s hiring of postdoctoral researchers. Some of the submitted evidence concerned preparations for a possible federal government shutdown, with employee furloughs, in early 2011, but the shutdown and furloughs never took place. Other materials indicate that budget cuts led the to offer early retirement and buyouts to employees, but these options would not have been available to short-term, temporary employees. Therefore, the petitioner did not show that his hiring at the in mid-2011 constituted an unusual vote of confidence on the s part.

The petitioner states that various circumstances limited his ability to produce published work. An October 2010 performance appraisal included an explanatory memorandum from Dr. explaining why the beneficiary received a "fully successful" rating (the middle rating out of three)

under "Demonstrated Research Accomplishments/Impact" even though he did not produce the publications required for such a rating. Dr. stated that the petitioner "has done very well in the collection and processing of data, but has not had the time to write. . . . I think the demands that were placed on [the petitioner] were probably unreasonable."

The director did not find that the quantity of the petitioner's published output was the basis for denial of the petition. Regardless, the petitioner has not established that the published work influenced the field.

The petitioner submits a new letter from another scientist at the Writing after the petitioner's departure from that laboratory, Dr. a research soil scientist, asserts that the petitioner "was a valuable team member" "[d]uring his tenure at" Dr. states:

> [The petitioner's] work on remote sensing of crop residue has garnered the attention of the scientific community as shown by an invited presentation to a regional meeting in 2012, and the selection of a photograph of [the petitioner's] research on the cover of . . . With time, [the petitioner's] research article will likely be highly cited by other scientists working in the area of crop residue remote sensing.
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> In addition to [the petitioner's] excellent remote sensing work, he has conducted groundbreaking analyses tracking long-term trends in major commodity crops throughout the U.S. using Agricultural Census data. His findings, which are currently being prepared in journal article form for submission to clearly document changes in cropping system diversity since 1978. Such information will almost certainly be useful to policymakers when crop diversity trends are geographically related to the presence of herbicide-resistant weeds, an issue of increasing concern throughout much of the U.S. Corn Belt.

Dr. speculates about the possible future citation of one of the petitioner's articles, and then, in the second quoted paragraph, refers to an area of research not previously discussed in the record. The record contains nothing to show that the petitioner's work at will be similar to the earlier efforts that formed the basis of the waiver claim.

A November 19, 2012 letter from secretary/treasurer of the thanked the petitioner for a presentation that he made on October 11 of that year. The petitioner has not established that this presentation "garnered the attention of the scientific community" to a greater extent than other presentations at regional gatherings. Further, the event took place well after the petition's January 2012 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Other exhibits, including requests for reprints and for the petitioner's participation in peer review, also postdate the filing of the petition. The petitioner has not established that such correspondence reflects that he has been an influential figure in his field, beyond the substantial prospective benefit that is a basic requirement for the classification he seeks, and which does not entail a waiver of the job offer requirement. The petitioner has not shown that his work for a government agency has significantly affected the policy or practices of that agency, and many witnesses discuss the importance of his work by speculating about the results it might eventually produce rather than pointing to known, existing effects.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.